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In the Supreme Court of the United States

October Term, 1965

No. 911

CHARLES P. LA PLACA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled cause on December 15, 1965.

Opinions Below

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit is not yet reported but is annexed hereto as Appendix A.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on May 17, 1965 (R. 2) and is set out at R. 150-151.

The judgment of the Court of Appeals for the First Circuit was entered on December 15, 1965, and is annexed hereto as Appendix B.

Jurisdiction

The judgment sought to be reviewed is dated, and was entered, December 15, 1965.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22(2).

Questions Presented

1. In a Federal perjury prosecution, may the objective falsity of a statement be determined without regard to explanatory matter added by the witness at a later point in the same proceeding?

2. Is the quantum of proof required to support a perjury conviction in the federal courts necessarily satisfied by proof of the objective incorrectness of the allegedly perjured statement?

3. Do the standards of proof applicable to a federal perjury prosecution permit an instruction to the jury, in the language of an ordinary criminal case, that subjective falsity may be inferred from all the "facts and circumstances in evidence" and that the jury is entitled to infer subjective falsity *either* from objective falsity standing along *or* from a finding that the defendant was "in a position to know" his testimony was false "on the basis of information available to him at the time he testified."

4. May hearsay evidence in the form of a transcript of the proceedings in another case (not the case in which the defendant is alleged to have given perjured testimony) be admitted against the defendant in a federal perjury prosecution, even under limiting instructions, where its necessary effect is to supply the core of the Government's case?

Statute Involved

18 U.S.C.:

§1621. *Perjury generally.*

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law be fined not more than $2,000 or imprisoned not more than five years, or both.

Statement of the Case

An indictment returned April 9, 1964 (R. 1), charged that the defendant, on December 12, 1963, gave perjured testimony at the armed robbery trial of one Alfred Fagundes in the District Court for the District of Massachusetts concerning the whereabouts of Fagundes on September 5, 1963 (R. 3-6). Judgment of conviction imposing a sentence of four years' imprisonment (R. 150-151) was entered on May 17, 1965 (R. 2).

By judgment dated and entered December 15, 1965, the Court of Appeals for the First Circuit affirmed the judgment of the trial court. (Appendix B, annexed hereto).

The evidence adduced at the trial may be summarized as follows:

Between the hours of approximately 1:00 and 1:20 in the afternoon of September 5, 1963, two armed robbers staged a $13,397 hold-up of the Brookline Trust Company, in Brookline, Massachusetts. (R. 11-12, 44).

One Alfred Fagundes was tried for this crime beginning December 10, 1963, and testified on December 12 (R. 13-15) that he was not in the Brookline Trust Company on the previous September 5 but that he arrived at the Middlesex Superior Court in Cambridge at about 1:50 P.M. on that day and appeared before a judge at two o'clock to have a default removed in connection with charges of "drunken driving and larceny of an automobile"[1] (R. 37-38).

On the same day, Charles P. LaPlaca, the petitioner here, who had been bondsman for Fagundes in connection with the state court charges (R. 39), was called as a defense witness by Fagundes' attorney, Joseph Sax. (R. 13-15). He had been served in the late morning with a subpoena to attend that day's afternoon session. (R. 99, 111-112). On direct examination by Mr. Sax, La Placa gave the following testimony, alleged by paragraphs (4) and (5) of the indictment to have been perjured (R. 3-4):

"Q. Do you remember September 5, 1963? A. Very well.

"Q. Did you receive a call that he had been defaulted that morning? A. Yes, I did.

"Q. Where did you go and tell us what you did and

[1] The charge actually was receiving stolen goods, namely, two automobile registration plates, of the value of less than one hundred dollars. (R. 95-96, 146-147).

what happened? A. Well, I got hold of you and we went out to Hillside Avenue in Roxbury to look for him. And then we went back to Cambridge, at Superior Court in Cambridge, and about 1:30—no, when court adjourned at one o'clock, I talked to Lieutenant Collins of the Somerville Police and I told him about Fagundes being an escapee from my bond. And I talked to him possibly five or six or seven minutes. And we stayed there.

"Then I think I had dinner or lunch, rather, in probably five or ten minutes, [59] and was back in the court room or the bottom of the court room, I might say, and it might have been 1:30 or 1:35 or 1:40, and you walked in the door and Fagundes came in behind you.

"And I said to Fagundes, 'Are you going to go upstairs?' And he said, 'Yes.' He said, 'I just was delayed.' I said, 'I am glad you are here because the bond is in escrow and I may be'—that is, the bond was gone.

"So we went upstairs, and I think at that time we had to wait until the Judge was—I think it was Bolster. And I went to talk to Henry Lyons at the time, who was the Clerk, and he wasn't there, and we waited until I think it was the first case, and you walked in with Fagundes.

"And I was so pleased, I said, 'There he is', I said, 'and he has come in.'" (R. 39-40).

On cross-examination by Mr. Manzone, the Assistant United States Attorney, LaPlaca testified that he can place the time he returned to the courtroom from Hillside Avenue as "between the recess of the Judge to the continuation of the court," which would be two o'clock, but that he cannot tell "minutes or anything like that." (R. 42-43). Then

follows a second series of answers, alleged by paragraphs (8) and (9) of the indictment (R. 5-6) to have been perjured, as follows:

"XQ. And what time did court start? A. I presume about two o'clock.

"XQ. Well, do you know? A. I don't know.

"XQ. Could it have been after two? A. No, I don't think so.

"XQ. Well, do you know then? A. No, I don't. I say I presume it was [66] two o'clock, because when this fellow came in I talked with him, and I said, 'I just went up and talked to the Judge.'—

"The Court: Never mind the conversation.

"XQ. In any event, it was not until at least two o'clock that Fagundes— A. No, I didn't say that at all. I say Fagundes came in before court started.

"XQ. How soon before court started? A. I would say a half hour.

"XQ. You mean he came in at 1:30? A. Sometime around that." (R. 43).

Paragraphs (6) and (7) of the indictment (R. 4-5) were ordered struck by the trial court (R. 7-8) and no evidence was received in support of them.

According to the testimony of the prosecutor, Mr. Mazzone, he said to LaPlaca, after the latter completed his testimony at the Fagundes trial, "Thanks a lot for what you did to me . . . you and I are all through." (R. 32).

To prove that LaPlaca did not believe his testimony at the Fagundes trial to have been true, the Government called as its first witness Francis D. McAuliffe, the official court stenographer at the afternoon session of the Middlesex Superior Court, who was permitted, over defendant's hearsay objection, to read verbatim his notes of that session.

The witness began by reading the entry, "2 P.M." (R. 47), although he had no recollection as to whether the entry indicated actual time or merely meant that court usually begins at that time (R. 58). After the call of three other cases and short colloquies concerning them, the Fagundes case was called. Thereafter follows a statement by Attorney Sax that Fagundes had failed to appear at his office as expected at noon of that day. Sax further stated that he had gone to Fagundes's house, but that Fagundes was not there. He then suggested a capias issue. Fagundes and his surety were then called, a default was entered, and a capias was ordered to issue. Thereupon, Sax made reference to the belated arrival of another lawyer in connection with one of the cases previously called, at which point the court said, "2:20 by our time." (R. 48-49).

At the conclusion of a long colloquy concerning this other case, Sax, according to the reporter's notes, informed the court that he had just received a message from Fagundes that he would be in court within twenty minutes. A recess was then taken to await Fagundes's arrival and the notes resume with the calling of the Fagundes case and the removal of the default, without further indication of time. (R. 54-55).

At the conclusion of the court reporter's testimony, the trial court attempted to obviate the hearsay objection by limiting the notes to the issue whether anyone appeared on the first occasion that the Fagundes case was called. (R. 62-63).

In order to show that LaPlaca's conversation with Lieutenant Collins about Fagundes being an escapee and the subsequent arrival of Fagundes occurred later than LaPlaca had testified, the Government called Collins. He testified that he had been standing in the courthouse corridor when LaPlaca came out of the courtroom in a crowd of people at about 2:30 P.M. (i.e., the recess referred to in

the reporter's notes as the one taken to await Fagundes's arrival) and approached Collins. LaPlaca told Collins that Fagundes had defaulted, accepted Collins's sympathy for his monetary loss as bondsman, and asked Collins to be on the lookout for Fagundes.[2] Fifteen minutes later, according to Collins, Fagundes arrived and entered the courtroom. (R. 74-79).

John Irwin, Jr., an Assistant District Attorney for Middlesex County, who described himself as a "good", as well as a "social", friend of the federal prosecutor, Mazzone (R. 67-68), testified that he was assigned to prosecute the Fagundes case in the Middlesex Superior Court. In all essential respects, his testimony concerning the events that took place in the courtroom between 2:00 and 2:30 P.M. ran parallel to the account contained in the notes of the court reporter, McAuliffe. Moreover, Irwin further strengthened the fixing of the time at 2:20 by his testimony that he remembers looking at his watch as well as the clock (R. 67) on the courtroom wall when the judge made reference to the time. Finally, he testified that he returned to the courtroom about twenty minutes after the 2:30 recess and there saw Fagundes for the first time that afternoon. (R. 63-67).

There was no evidence offered by the Government as to what time the judge returned to the courtroom or as to when Fagundes arrived with reference to the time of the judge's return.

The defendant, Charles P. LaPlaca, then took the witness stand and testified that he is fifty-seven years old, lives in South Boston, is a bondsman, is married, and lives with

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[2] This conversation must, of course, have occurred prior to 2:30 P.M. as LaPlaca testified at the Fagundes trial (R. 39) and reiterated at his own trial (R. 109). LaPlaca would not, during a recess called to await Fagundes' then expected arrival, logically be accepting sympathy for the loss of his bond and asking Collins to keep an eye out for Fagundes as an escapee.

his family, consisting of four children. Further testimony concerning the defendant's family was cut off by the trial court. He then testified that he was summonsed to appear on December 12, 1963, the day he testified in the Fagundes case. He admitted testifying in the Fagundes trial as charged in paragraphs (4) and (8) of the indictment. He explained that he judged the time of the various events in his testimony according to the normal recess of the court day, which is one to two, and that at no time did he say he was sure of the time or positive, but judged it from the time of the normal recess. He never knew of another recess until afterwards. When he referred to a recess in his testimony, he referred to the one to two recess, which is what he based his time on.[3] At the time he testified, he believed his testimony to be true to the best of his recollection and belief. (R. 98-102).

On cross-examination, the defendant stated that he previously testified at the Fagundes trial to the time 1:30, 1:35, or 1:40 because he knew it was after a recess and assumed it was the noon recess. (R. 104). The defendant does not remember being in Judge Bolster's session at two o'clock on September 5, 1963. He was aware that Fagundes was defaulted in the morning. He heard Mr. Irwin and Lieutenant Collins testify at this trial, but the testimony of neither man refreshes his recollection. It is still his testimony that, to the best of his belief and recollection, he did not meet Lieutenant Collins at 2:30.[4] (R. 108-109). The only memory he has of going into the courtroom is when Fagundes showed up. Whether that was after two o'clock, or not, he does not know. He thought it was after the noon-day recess. Since then he has heard there was another recess, but he did not know about it. (R. 110-111).

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[3] It is interesting to note that Mr. Lyons, the clerk of court on September 5, also used the end of the recess as a point of reference in fixing the time of Fagundes' arrival. (R. 97).

[4] See Footnote 2, *ante*.

On redirect examination, the defendant testified that Sax told him at one time about Fagundes being defaulted; but he thinks it was someone else who told him at eleven in the morning that Fagundes had not shown up and he drew the conclusion that Fagundes was defaulted.[5] (R. 112).

Reasons For Granting the Writ

The reasons submitted for granting the writ are most clearly and concisely expressed against the background of a summary exposition of the errors committed below.

In upholding the denial of petitioner's motion for judgment of acquittal (R. 143, 148-149), the lower court erred in two respects.

In the first place, the petitioner was quite clear in his testimony at the Fagundes trial that Fagundes arrived at the Middlesex Superior Court "before court started," he "would say a half hour [before the start]," and that he "presume[s that court started] about 2:00 o'clock," but "I don't know." (R. 43). As to whether it could have been after 2:00, "I don't think so [but] I don't [know]." (R. 43). Accordingly, he judged that Fagundes came in "[s]ome time around [1:30]" (R. 43); "it might have been 1:30 or 1:35 or 1:40." (R. 39).

Essentially then, LaPlaca testified merely that Fagundes arrived at the courthouse approximately twenty minutes before the end of a recess and that it was presumably about 2:00 o'clock that the recess ended and court reconvened.

On the other hand, the Government's evidence at LaPlaca's trial was that Fagundes entered the courtroom fifteen minutes after a recess which began at 2:30 P. M.

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[5] Lieutenant Collins' testimony as to the content of his conversation with LaPlaca corroborates LaPlaca's testimony that, at the time of this conversation, he believed Fagundes to have been defaulted. For the proposition that LaPlaca was correct, and Collins mistaken, as to the *time* of the conversation, see Footnote 2, *ante*.

and was seen present in the courtroom by Assistant District Attorney Irwin twenty minutes after the recess began. The Government offered no evidence as to the duration of the recess or as to when Fagundes appeared with reference to the time that the recess ended and the court reconvened.

The only evidence, therefore, which in any way at all contradicts LaPlaca's allegedly perjured testimony is that the recess during which Fagundes appeared was a special one that began at 2:30 P. M. rather than, as LaPlaca *presumed*, the usual one that is taken between 1:00 and 2:00 P. M. It is only by disregarding the petitioner's qualifying statements and lifting out of context his initial statement that Fagundes "might have" arrived between 1:30 and 1:40 P. M. (R. 39) that the Government is able to show a statement that is even objectively incorrect. Explanatory matter may not be so disregarded. *Van Liew* v. *United States*, 321 F. 2d. 674, 677-678 (5th Cir. 1963); *Brown* v. *United States*, 245 F. 2d. 549, 555 (8th Cir. 1957); *Fotie* v. *United States*, 137 F. 2d. 831, 841-842 (8th Cir. 1943); cf. *Reiss* v. *United States*, 324 F. 2d. 680, 686 (1st Cir. 1963).

Secondly, even assuming that an objectively incorrect statement can be made out of LaPlaca's testimony, common experience, as a measure of what LaPlaca ought to have remembered, falls far short of proving that he *must* have remembered correctly the time of Fagundes's arrival, as that test is applied in *United States* v. *Nicoletti*, 310 F. 2d. 359, 363 (7th Cir. 1962), *United States* v. *Beach*, 296 F. 2d. 153, 155 (4th Cir. 1961), and *Behrle* v. *United States*, 100 F. 2d. 714, 716 (D. C. Cir. 1938). It was said in *United States* v. *Otto*, 54 F. 2d. 277, 279 (2d. Cir. 1931):

> "It is obvious that all knowledge, apart from that possessed by the person himself, as to what one does

remember, lies in what common experience shows he ought under given circumstances to remember."

How many lawyers can recall repeatedly leafing through the afternoon transcripts of a trial, in complete certainty that a particular event occurred shortly after the beginning of an afternoon session, and then, when finally willing to concede that the event may have occurred during a morning session, finding the sought after portion of the transcript following, say, the beginning of the second half of the morning session. Similar experiences in other fields are, of course, common to all who are subject to the frailties of human memory.

The specific issue, therefore, which was incorrectly decided by the court below is whether the instant case falls within the general rule expressed in *Young* v. *United States*, 212 F. 2d. 236 (D. C. Cir. 1954), that subjective falsity may generally be inferred from objective falsity standing alone, or whether it falls within an exception, *i.e.*, where the "'overt act' [*i.e.*, the objective fact] . . . may not be any proof [of state of mind]." See *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411, 70 S. Ct. 674, 690 (1950) (footnote 21).

At the trial, the Government recognized its total reliance on the proposition that the inference of subjective falsity may be drawn solely from a finding of objective falsity by candidly advancing the *Young* case as "[t]he important one from the point of view of the Government." (R. 120-121). In accordance with the Government's view, the trial court instructed the jury "on the basis of your so finding [objective falsity], if you do so find, you would be warranted in finding [subjective falsity]. . . ." (R. 132).

Although the case was presented by the Government and submitted to the jury on this theory, the Court of Appeals

found three additional grounds on which to hold the inference warranted, as follows (see Appendix A, pp. 5a-6a):

(1) LaPlaca testified "at the Fagundes trial that he remembered 'very well' the events of September 5, 1963": With all respect due that court, there is a vast difference between a memory of events and a memory of the time at which they occurred. Moreover, to hold a witness strictly accountable for a preliminary, general statement of the certainty of his memory before it was tested by specific inquiries is simply and plainly not fair.

(2) September 5, 1963, was "only some two months past" when LaPlaca testified at the Fagundes trial: This is an incorrect statement of fact. LaPlaca's testimony was given on December 12, 1963. (R. 14-15). More precisely, September 5, 1963, was *three* months and seven days past.

(3) "Since he [LaPlaca] stood to lose $25,000 if Fagundes was not found in time to persuade the court to renew [sic] the default, it is reasonable to assume that the events of the day had made a very considerable impression": This also contains a critical misstatement of the record. The amount of the bond was *five* thousand dollars (R. 54, 147), one-fifth of the amount considered by the Court of Appeals in arriving at its decision. Moreover, while it may be "reasonable to assume that the *events* of the day had made a very considerable impression", it is a non sequitur to conclude that the time of day that each event occurred made the same impression. Finally, it may be equally reasonable to assume that the stress of the day's events may have served to impress considerable confusion on LaPlaca's memory.

On the other hand, the Court of Appeals disregarded the many factors detracting from the materiality of the objective falsity:

(1) Lieutenant Collins was quite obviously mistaken as to the time of his conversation with LaPlaca (and would himself be a likely candidate for a perjury indictment if the opinion below were correct law and he were not a Government witness). Otherwise, why would LaPlaca, who had just left the courtroom on a recess declared to await Fagundes's expected arrival within twenty minutes, thereupon immediately bemoan the loss of his bond and ask Collins to be on the lookout for Fagundes? Indeed, Collins' testimony as to the content of his conversation with LaPlaca gives the truth to LaPlaca's testimony at the Fagundes trial that he thought Fagundes had been defaulted in the morning and that he spoke to Collins prior to 2:00 P. M. Regrettably, this point, which should have been conclusive against the Government on the whole case, went unnoticed by petitioner, counsel, and the trial judge, who instructed on the point as follows:

"but if on the contrary you believe that Fagundes did not arrive . . . there . . . until about the time testified to by Lieutenant Collins and Assistant District Attorney Irwin, and if you are satisfied that Mr. LaPlaca had a conversation with Lieutenant Collins at around 2:30 in which Mr. LaPlaca told the Lieutenant, Fagundes had just been defaulted on him and asked the Lieutenant to keep an eye out for him, on the basis of your so finding, if you do so find, you would be warranted in finding Mr. LaPlaca knew Fagundes

was not at the Middlesex Superior Court until sometime around 2:30 or later."

The point was, however, brought to the attention of the Court of Appeals but obviously not with sufficient forcefulness.

(2) LaPlaca, during the course of his testimony at the Fagundes trial, made it quite plain that, in fixing the time of Fagundes' arrival, he was relying entirely on the *presumption* that the recess during which Fagundes arrived on the courthouse was the usual afternoon recess that is regularly taken between 1:00 and 2:00 P. M.

(3) It was LaPlaca, himself, who, with full candor, gave the Government the lead to Lieutenant Collins and thereby supplied the second witness against himself.

(4) There was no evidence that LaPlaca, prior to taking the stand at the Fagundes trial, was exposed to any events or testimony which should properly have influenced him to reexamine his memory or the certainty of it.

(5) There was no evidence that LaPlaca had any motive or opportunity to contrive false testimony.

The third respect in which the lower court erred was in its interpretation of the two-witness rule enunciated in *Weiler* v. *United States*, 323 U. S. 606, 65 S. Ct. 548 (1945). The trial court not only refused to apply the two-witness rule to the issue of subjective falsity, as requested by LaPlaca, but, instead, instructed in the language of an ordinary criminal case that intent may be circumstantially proved from all the "facts and circumstances in evidence" (R. 128) and that the jury could infer subjective falsity *either* from objective falsity standing alone (R. 132-133) *or*

from a finding that the defendant was "in a position to know" his testimony was false "on the basis of information available to him at the time he testified" (R. 134).

The effect of the trial court's instruction, therefore, was to permit the jury, if it rejected the inference of subjective falsity from objective falsity alone (which the jury was instructed had to be established by two witnesses), to make the inference from such vague standards as the defendant's "position to know" (R. 134) or "all other facts and circumstances in evidence" (R. 128) (which the jury was *not* instructed had to be established by two witnesses).

The Court of Appeals interpreted petitioner's position as arguing for the need of testimony from two witnesses furnishing direct evidence of state of mind and held that the two-witness rule applied only to objective falsity. Its interpretation of the petitioner's position and of the law are both incorrect. Petitioner argues only for the rule stated by the prestigious panel of Chief Judge Swan and Judges A. N. and L. Hand in *United States* v. *Remington*, 191 F. 2d 246 (2d Cir. 1951), the relevant portion of which is annexed hereto as Appendix C, to the effect that two "witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief." *Id.* at 249.

Perjury is, by statutory definition, a false representation of a state of mind, *i.e.*, a statement which the witness does not "believe to be true." 18 U.S.C. § 1621. There is nothing in the statute making objective falsity an element of the crime. Logically, therefore, an objectively correct statement of fact, if subjectively false, could amount to perjury. See 65 Harv. L. Rev. 520 (1952). It follows that objective falsity is only one of the many objective facts which the jury may, depending on the circumstances, be entitled to consider in drawing the ultimate inference of

subjective falsity. To say that the two-witness rule applies only to the proof of objective falsity, and not to the myriad other facts from which, in any given case, the inference of subjective falsity may be drawn, would unduly limit the force of *Weiler* and contradict the definition of perjury. It is only the *Remington* rule, therefore, that gives any meaning to the principles laid down in *Weiler*.

In the instant case, the instructions to the jury as approved by the Court of Appeals fall squarely into the error pointed out in *Remington* at pages 249-250:

> "Moreover, the vagueness of the charge was increased by the instruction that the jury might draw the reasonable inferences and conclusions from the evidence, whether the evidence be a direct statement of fact or of circumstances. The jury was told, 'You may not have direct proof of a fact but you may have circumstances from which you are able to draw reasonable conclusions and deductions.' Hence, despite recital in the charge of the rule as to two witnesses or one corroborated witness, the jury may have thought that they could select such evidence as they chose as proof of guilt and were free to convict on circumstantial evidence alone, which is not the law in the federal courts."

The final error was the admission into evidence of the entire transcript of the proceedings of September 5, 1963, in Middlesex Superior Court under the limiting instruction that it was to be considered only on the issue whether Fagundes failed to appear on the first call of his case sometime after the beginning of the afternoon session. (R. 62-63). This in effect bestowed evidentiary value on the 2:00 P. M. notation appearing at the beginning of the transcript, the source of which the reporter was unable to give

(R. 58); and to the 2:20 P. M. statement made by the Superior Court judge. The Court of Appeals upheld the ruling on the basis of the principle of law cited in 6 Wigmore, Evidence § 1791 (3 ed. 1940) to the effect that utterances serving to mark a time or place are admissible so far as they have a real service for that purpose and are not used merely as a pretext for introducing a hearsay assertion.

What the court below failed to do was to follow Professor Wigmore's cross-reference to § 418 of the same work which makes it plain that the content of the utterance may not be used to identify the time.

What is worse, however, is that the stenographic transcript was obviously used by the Government as the springboard for its case against LaPlaca, by the Government witnesses, Collins and Irwin, as the chief source of their information, and by the jury as the best evidence of everything that occurred.

Turning now to the specific reasons for granting the writ:

1. *Questions of Broad Importance to the Administration of Criminal Justice in the Federal Courts Are Presented*

This case does not present merely the question whether the evidence is sufficient to convict or whether the court below has emasculated the two-witness rule in federal perjury prosecutions or permitted a relaxation of the rules of evidence where, if anything, they should have been applied with an extra measure of strictness. Rather it asks how much real protection against the jury who tries him as well as against the injured prosecutor will the law afford the witness whose testimony supports the defense in federal criminal prosecutions.

This is a question that cuts across all criminal prosecutions. More and more, practicing attorneys are being consulted by witnesses who are not actual or potential parties to litigation. The advice sought is usually, "Do I have to testify and become involved in this?" If grounds for invocation of a privilege are not apparent, then the answer must, of course, be in the affirmative. On the other hand, suppose that the client's memory is in clear conflict with the testimony of two or more other potential witnesses on a point of critical importance to criminal litigation and, further, that his testimony will tend to support the theory of the *defense*. Assume, also, that it lies in the grey area of common experience as to whether or not he should remember accurately. What then is the attorney to do, with the First Circuit's opinion before him, if not to advise his client, even at the risk of straining the point, either to invoke his privilege against self-incrimination or, at least, with due apology to the defendant, to modify the certainty of his memory. The only alternative, which is hardly worthy of serious consideration, is to risk indictment and to trust that the experience of the jury will coincide with that of the witness.

More particularly, the question is whether the ordinary rules of evidence, modified by the special, two-witness rule, are enough "to protect witnesses from too-ready punishment for mere lapse of memory," *United States* v. *Letchos*, 316 F. 2d. 481, 484 (7th Cir. 1963), or whether additional safeguards are needed. The *Weiler* case recognizes that "equally honest witnesses may well have differing recollections of the same event." 323 U. S. at 609, 65 S. Ct. at 550. If this is so, of what protection is the two-witness rule to the honest witness whose recollection differs from that of two other witnesses to the same event?

Now that twenty years have passed since *Weiler*, has not the time arrived to review and consolidate the many and

varied expressions of the rule that the "[t]he degree and character of proof required in a perjury prosecution is different than in an ordinary criminal case," *United States* v. *Magin*, 280 F. 2d. 74, 76 (7th Cir. 1960) and that the proof must be "direct," "positive," "strong," "clear," "convincing," or various combinations of these qualities. *LaRocca* v. *United States*, 337 F. 2d 39, 43 (8th Cir. 1964); *Sigman* v. *United States*, 320 F. 2d 176, 178 (9th Cir. 1963); *United States* v. *Magin*, *supra* at 76; *Beckanstin* v. *United States*, 232 F. 2d. 1, 4 (5th Cir. 1956); *United States* v. *Neff*, 212 F. 2d. 297, 306-307 (3rd Cir. 1954); *United States* v. *Remington*, *supra* at 249; *Allen* v. *United States*, 194 Fed. 664, 668 (4th Cir. 1912).

2. *The Lower Court Decided an Important Question of Federal Law in a Way in Conflict with Applicable Decisions of This Court*

This Court in *Weiler* v. *United States*, *supra*, held that it was reversible error for the trial court to fail to instruct on the two-witness rule. Since objective falsity is not an element of the crime of perjury but is only one of many facts which may be relevant to the ultimate issue of subjective falsity, the Court in *Weiler* obviously held by necessary implication, as the court in *Remington* explicitly held, that the two-witness rule is applicable to *all* the facts from which the jury may infer subjective falsity. This is merely the more precise way of saying that subjective falsity must be proved by two witnesses and is not to say that the Government is required to produce direct evidence of subjective falsity.

In permitting the lower court to instruct that the jury was entitled to infer subjective falsity from all the facts and circumstances in evidence, without instructing that the inference could be drawn only from those facts and

circumstances which the jury found to have been established by the testimony of two witnesses, the Court of Appeals has departed from the rule of the *Weiler* case.

3. *If the Decision of the Lower Court Is Not in Conflict with Applicable Decisions of This Court, Then It Has Decided an Important Question of Federal Law Which Should Be Settled by This Court*

We submit that *Weiler* holds that the two-witness rule is applicable not only to the fact of objective falsity but also to all other facts from which subjective falsity may be inferred. If it does not, then it is at least as clear that it has not established a contrary principle. Therefore, it follows that Weiler has left open a question the answer to which is essential to the proper application of that case. It hardly seems necessary to belabor the point that it is of little value to know that the two-witness rule applies in federal perjury prosecutions without knowing what it is that must be established by two witnesses.

Also left open by *Weiler*, of course, are the questions posed in Section 1, *ante*, particularly the question whether the two-witness rule affords enough protection to federal criminal defense witnesses.

4. *The Decision of the Lower Court Is in Conflict with the Decision of Another Court of Appeals on the Same Matter.*

The holding of the court below that subjective falsity need not be proved by the two-witness rule and that the jury may infer subjective falsity from circumstantial evidence other than objective falsity without regard to the two-witness rule is in direct conflict with the holding in

Remington v. *United States, supra* (see Appendix C), that, in determining the issue of subjective falsity, the jury may consider only such facts, objective falsity included, which have been established in accordance with the two-witness rule.

Like the Seventh Circuit in *United States* v. *Nicoletti, supra,* and *United States* v. *Magin, supra,* the court below has given too little credit to the thought given the *Remington* opinion by the scholarly panel which authored it.

5. *The Decision Below Is Plainly Erroneous and Has Resulted in a Gross Miscarriage of Justice*

It hardly seems possible that the able trial judge and a panel of three learned appellate judges would permit this petitioner to spend four years in prison because he incorrectly presumed to use the wrong recess as a point of reference and thereby was off an hour and five minutes in time. It seems even less possible when it is considered that the conviction is supported by the testimony of a witness who is now clearly revealed as himself mistaken in his judgment of time and who in fact corroborates the defendant in other important respects.

If ever before this Court has granted review because the injustice is greater even than the importance of the questions presented, then this petitioner is not entirely without hope.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DiMento & Sullivan
January 7, 1966

Appendix A

United States Court of Appeals
For the First Circuit

No. 6567.

CHARLES P. LA PLACA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* HASTIE* and MCENTEE, *Circuit Judges.*

Francis J. DiMento, with whom *James J. Sullivan, Jr.*, and *DiMento & Sullivan* were on brief, for appellant.

John Paul Sullivan, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

December 15, 1965.

MCENTEE, *Circuit Judge.* Defendant was convicted of giving perjured testimony in violation of 18 U.S.C. § 1621.[1] The alleged perjury occurred on December 12, 1963 in the

*Sitting by designation.

[1] "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorized an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

United States District Court in Boston at the trial of one Alfred Fagundes who was charged with armed robbery of the Brookline Trust Company in Brookline, Massachusetts. It was established at the trial that the robbery took place between one o'clock and 1:20 in the afternoon of September 5, 1963. Fagundes claimed that about that time he was in Middlesex Superior Court in Cambridge; that he arrived there "about 1:50" on that afternoon and appeared before the court at 2 p.m. to have a default removed in connection with some charges then pending against him.

The testimony of the appellant, La Placa, at the Fagundes trial substantiated this alibi and it is this testimony that is the basis of the perjury indictment against him. La Placa testified he was a bondsman by occupation and had provided bail for Fagundes in the cases pending against him in Middlesex Superior Court; that he remembered the events of September 5, 1963 [the day of the robbery] "very well;" that having heard Fagundes had been defaulted in Middlesex Superior Court that morning, he went looking for him, and failing to locate him arrived at Middlesex Superior Court in Cambridge shortly before one o'clock; that he was afraid the bond would be defaulted; that when court adjourned at one o'clock he had a brief conversation at the court house with a Lieutenant Collins of the Somerville police in which he mentioned the Fagundes default; that "sometime around 1:30 p.m." Fagundes came into the court house with his lawyer and the three of them went upstairs to the court room; and after a brief wait, Fagundes and his attorney went into the court room and the default was removed. La Placa carefully explained that he fixed the time of Fagundes' arrival at Middlesex Superior Court at 1:30 to 1:40 p.m. because he thought it was during the noon recess, that he assumed court would start again at 2 p.m. and that Fagundes came in about a half hour before court resumed that afternoon.

To show the falsity of this testimony the government produced three witnesses. The testimony of the official court stenographer who was on duty in Middlesex Superior Court on September 5, 1963, showed that when the case of *Commonwealth* v. *Fagundes* was called at the afternoon session shortly after 2 p.m., no one appeared.

The Assistant District Attorney of Middlesex County who was also on duty during the afternoon session of that day, which he said commenced at 2 p.m., testified that when the Fagundes case was first called Fagundes was not in court; that at 2:20 p.m. he was not in court; that at 2:30 p.m. Fagundes' attorney addressed the court and a recess was called; that upon returning to the court room about 2:50 he saw Fagundes in court for the first time that day.

The government also produced Lieutenant Collins, with whom La Placa had testified he had a conversation at about one o'clock that day. Collins testified that this conversation took place at 2:30 p.m. and not 1 p.m. He also testified that he saw Fagundes hurriedly come into the court room at 2:45 p.m.

La Placa took the stand in his own defense and readily admitted that the testimony quoted in the indictment against him that Fagundes came into Middlesex Superior Court "sometime around 1:30 p.m." on the day of the robbery was the testimony he gave at the Fagundes trial. He again explained that he judged the time to be sometime around 1:30 because he knew it was after a recess and thought it was the noon recess. He now contends that if in fact this was not the time Fagundes arrived at Middlesex Superior Court he had merely made an innocent mistake as to time.

The principal question raised on appeal is—what degree of proof is necessary to uphold a perjury conviction. The degree and character of the proof required in a perjury prosecution are different than in an ordinary criminal case.

United States v. *Magin*, 280 F.2d 74 (7th Cir. 1960). There are two essential elements of proof in perjury cases.[2] First, the statements made by the defendant must be proven to be in fact false. Secondly, it must be proven that the defendant did not believe the statements when made to be true. *Young* v. *United States*, 212 F.2d 236 (D.C.C.A. 1954), *cert. denied*, 347 U.S. 1015.

It is well settled that the objective falsity of the statements made must be established in conformity with "the two witness rule" which is peculiar to perjury prosecutions. Properly stated, this rule requires direct proof of the falsity of the statements made by the testimony of two witnesses or by the testimony of one witness plus corroborating circumstances. *Weiler* v. *United States*, 323 U.S. 606, 610 (1945). In effect, then, the rule prohibits conviction based on the testimony of only one witness. *Hammer* v. *United States*, 271 U.S. 620, 626 (1925). The testimony of Assistant District Attorney Irwin and Lieutenant Collins satisfies this rule.

It is the appellant's contention that "the two witness rule" should be invoked not only to prove the objective falsity of the statements, but also to prove the second element of the crime, namely, that the defendant knew his testimony was false. While objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950); *United States* v. *Remington*, 191 F.2d 246, 249 (2d Cir. 1951). As a practical matter it would be almost impossible for the prosecution to prove, except through circumstantial evidence, that La Placa actually remembered the facts to which he testified

[2] Under the statute (see footnote 1), the false testimony also must be given under oath and must be material. It is not disputed in this case that the appellant's testimony was given under oath and that it was material.

and that he knowingly made false statements. See *Behrle* v. *United States*, 100 F.2d 714, 716 (D.C.C.A. 1938). As the court said in *United States* v. *Magin, supra:*

> "We think, however, that strong and convincing circumstantial evidence may prove the intent to falsify just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt."

Thus, we hold that the appellant's belief that the statements he made were false need not be proved by the "two witness rule;" and that in appropriate circumstances belief of falsity may be inferred by proof of the falsity itself. *United States* v. *Magin, supra.* See *United States* v. *Nicoletti*, 310 F.2d 359, 363 (7th Cir. 1962), *Young* v. *United States, supra.* Consequently, the trial court properly refused defendant's requested instruction to the jury on this point.[3]

The defendant also argues that there was insufficient evidence of the falsity of his testimony from which a jury could reasonably infer that he made the statements with intent to falsify. But in reviewing the evidence in this case, particularly the testimony of Lieutenant Collins and Assistant District Attorney Irwin, we feel that the jury's inferences were warranted by the evidence. This is especially so in light of the statement made by La Placa himself at the Fagundes trial that he remembered "very well" the events of September 5, 1963. That date was only some two months past, and appellant was no mere by-

[3] The defendant duly filed a request for instruction as follows:
"20. In a case such as this, the Government is required to prove beyond reasonable doubt that the defendant knew his testimony was untrue when given and such knowledge must be proven by the sworn testimony of two witnesses or of one witness whose testimony is corroborated or supported by other evidence in the case."

stander. Since he stood to lose $25,000 if Fagundes was not found in time to persuade the court to renew the default, it is reasonable to assume that the events of the day had made a very considerable impression.

Finally, appellant contends that the testimony of the official court stenographer of Middlesex Superior Court was admitted into evidence in violation of the hearsay rule. It is basic that hearsay is an extra-judicial statement offered for the purpose of proving the truth of the matter contained therein. This evidence was not introduced for that purpose.[4] Statements serving to mark a time or place are admissible so far as they have a real service for that purpose and are not used merely as a pretext for introducing a hearsay assertion. See 6 Wigmore, Evidence § 1791 (3d ed. 1940).

Affirmed.

[4] The trial court carefully instructed the jury that this evidence was admitted for the limited purpose of allowing the jury to consider, to the extent that the "notes indicate that at sometime, the exact duration of which is for you [the jury] to decide, after the afternoon session began in the Middlesex Superior Court on September 5, 1963, they called the Fagundes case over there and nobody appeared, purporting to be Mr. Fagundes, the first time the case was called on the afternoon of September 5."

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6567.

CHARLES P. LAPLACA,
Defendant, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

JUDGMENT

December 15, 1965.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

Appendix C

UNITED STATES v. REMINGTON.
No. 293, Docket 22045.
United States Court of Appeals
Second Circuit
Argued June 15, 1951.
Decided Aug. 22, 1951.

Before SWAN, Chief Judge, and AUGUSTUS N. HAND and L. HAND, Circuit Judges.

SWAN, Chief Judge.

After a protracted jury trial the appellant was found guilty of the crime of perjury in testifying before a grand jury that he had never been a member of the Communist Party.[1] The evidence submitted to the jury related to three periods, in each of which the prosecution specified in a bill of particulars that the appellant was a member of the Party. The first period covered the years 1936-7, when he was employed as a TVA messenger at Knoxville, Tennessee; the second covered the years 1937-40, during which he was a student at Dartmouth and Columbia; and the third covered the years 1940-44, when he was employed in Washington.[2] The jury's general verdict gives no intimation as to the period or periods in which they found him to have been a member of the Communist Party. The appeal challenges the validity of the indictment, the sufficiency of the evidence, the adequacy of the charge to the jury, and the correctness of numerous rulings of the court in the course of the trial. Our conclusion that the judgment must be reversed on account of the inadequacy of the charge to the jury makes unnecessary discussion of many of appellant's contentions.

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[1] 18 U.S.C.A. § 1621.

[2] Evidence as to an earlier period, 1934-6, covering the appellant's freshman and sophomore years at Dartmouth, was withdrawn from the jury.

[1, 2] 1. The Indictment: At the commencement of the trial the court denied a motion to dismiss the indictment for failure to state an offense. The indictment alleged that in May 1950 the defendant appeared as a witness before a grand jury for the southern district of New York, which was investigating possible violations of the espionage laws; that he was asked the question: "At any time have you ever been a member of the Communist Party?" and he answered under oath, "I have never been"; and that "the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party." The statute defines the crime of perjury to be stating under oath "any material matter which he does not believe to be true"[3]. Thus perjury consists in testifying to the truth of a fact which the accused does not believe to be true;[4] his oath must contradict his belief as to the fact sworn to, for otherwise his oath is not wilfully false. In the case at bar the indictment charged that Remington did not believe his denial of membership in the Communist Party, since it alleged that he "well knew and believed" that his testimony was untrue. The further allegation that he had in fact been a member of the Party was surplusage,[5] but proof of the fact of membership might be relevant on the issue of his belief that

[3] 18 U.S.C.A. § 1621: "Whoever, having taken an oath before a competent tribunal, * * * that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *."

[4] Regina v. Schlesinger, 2 Cox C.C. 200; State v. Cruikshank, 6 Blackf., Ind. 62; Com. v. Milles, 140 Ky. 577, 131 S.W. 385; State v. Gates, 17 N.H. 373; 1 Hawkins, Pcas, 1787 Ed., c. 69, § 6, p. 322; 2 Wharton, Criminal Law, 12th Ed., §§ 1512-13.

[5] United States v. Hiss, 2 Cir., 185 F.2d 822, 831, certiorari denied 340 U.S. 948, 71 S.Ct. 532; Sharron v. United States, 2 Cir., 11 F.2d 689, 690.

he had been a member. There was no error in denying the motion to dismiss the indictment for failure to charge a crime.

2. Sufficiency of the Evidence: As to this it will suffice to say that we find no error in the court's refusal to direct a verdict of acquittal. Since the evidence upon a new trial, if there be one, may be different, there is no need to discuss the evidence in the present record.

[3, 4] 3. The Charge: The principal attack upon the judgment of conviction concerns the charge to the jury. It contained the following instruction: "To find membership in the Communist Party you must find that the defendant performed the act of joining the party. The act of joining is crucial. This is not to say that you must find evidence of the very act of joining the party, but rather from all the evidence you must be convinced beyond a reasonable doubt that he was, in fact, a member of the Communist Party, and was accepted as such by the Party."

This is all we can find by way of definition of what constituted membership in the Party. To this instruction the defendant excepted, because the language following the statement that "the act of joining is crucial" made the charge too "vague and indefinite" to constitute any definition at all of what facts the jury must find in order to convict the defendant. Because of the peculiar rule concerning proof in perjury cases, we think the exception was well taken. That rule requires "direct" proof of the crime by two witnesses who testify that the accused violated his oath, or "direct" proof by one witness plus corroborating circumstances.[6] Since the crime of perjury

[6] See United States v. Wood, 14 Pet. 430, 10 L.Ed. 527; United States v. Hiss, 2 Cir., 185 F.2d 822, 824, certiorari denied 340 U.S. 948, 71 S.Ct. 532; United States v. Otto, 2 Cir., 54 F.2d 277, 279; Clayton v. United States, 4 Cir., 284 F. 537, 539, 540; Radomsky v. United States, 9 Cir., 180 F.2d 781, 782, 783.

consists in the contradiction between the accused's oath and his belief, the only "direct" evidence of his guilt would seem to be his own declarations of his belief. But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated.[7] This distinction was laid down in United States v. Wood, 14 Pet. 430, 10 L.Ed. 527, which has been often followed.[8] Since only written declarations will suffice, it follows that if the critical issue must be proved by "direct" evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by "direct" evidence. And this view is confirmed by Chief Justice Vinson's opinion in American Communications Ass'n v. Douds, 339 U.S. 382, 411, 70 S.Ct. 674, 690, 94 L.Ed. 925, where it is said: "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing."

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[7] We lay to one side a possible exception as to contradictory oral declarations made by the accused under oath, as the case at bar involves no declarations of this character. See Wigmore, Evidence, 3rd ed., § 2043.

[8] Clayton v. United States, 4 Cir., 284 F. 537, 540; Phair v. United States, 3 Cir., 60 F.2d 953, 954; Hart v. United States, 9 Cir., 131 F.2d 59, 61; Fotie v. United States, 8 Cir., 137 F.2d 831, 840. Compare United States v. Harris, 311 U.S. 292, 61 S.Ct. 217, 85 L.Ed. 196.

Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some "overt act" from which the jury may "infer" the accused's actual belief.

[5] We do not see how the perjury rule can in practice be applied at all in such a case as the present unless the judge shall single out such "overt acts" as furnish a rational basis for inferring what the accused thought constituted membership and which were supported as the rule requires, and shall then instruct the jury that unless they believe the testimony as to such facts—or at least one of them—and think that because of it, taken with any corroborating evidence, the accused must have believed he was a member, they cannot find him guilty. The jury's verdict of guilt presupposes that they have made some definition of their own as to what the accused thought constituted membership and have found some act by him from which they have inferred that he believed himself a member, as so defined. Surely the definition of membership is a vital part of the "overt acts" from which the accused's belief is to be inferred. Unless the court shall instruct the jury in the manner suggested, the rule becomes no more than that there must be in the "direct" proof some "overt act" from which the jury might "infer" the guilty state of mind, but which they may totally disregard in finding their verdict. To ascribe such meaning to the rule would deprive the accused of the full protection which it is intended to afford him. Moreover, the vagueness of the charge was increased by the instruction that the jury might draw the reasonable inferences and conclusions from the evidence, whether the evidence be a direct statement of fact or of circumstance. The jury was told, "You may not have direct proof of a fact but you may have circumstances from which you are able to draw reasonable conclusions

and deductions." Hence, despite recital in the charge of the rule as to two witnesses or one corroborated witness, the jury may have thought that they could select such evidence as they chose as proof of guilt and were free to convict on circumstantial evidence alone, which is not the law in the federal courts.[9]

As indicated above it is our opinion that the perjury rule requiring direct evidence cannot be applied unless the court specifically declares what are the "overt acts" which the jury must find, and which the court decides are properly supported under the perjury rule and of themselves form a rational support for finding that the accused's oath and his belief conflicted. In the case at bar this demanded that the judge point out what facts so supported would justify a finding that the accused did not believe that he had never been a member of the Communist Party. Whatever may be thought of the archaic rule as to proof of perjury, it is still the law in the federal courts and its breach in this case operated unfairly, for the accused never learned until the filing of the government's brief on appeal what acts the prosecution would contend showed that he believed himself to have been a member of the Party. In opposing a motion for a bill of particulars, counsel for the government argued that it was "most difficult" to define what constituted membership; and the court did not require the prosecution to specify what facts it would rely on to prove an act of joining or to justify an inference that the accused knew he was a member. The result of leaving the issue so at large was that, as the case was tried, the defendant did not know even at the end of the government's case what he had to meet; he could only guess what the prosecution was

[9] United States v. Otto, 2 Cir., 54 F.2d 277, 279; Clayton v. United States, 4 Cir., 284 F. 537, 539; Radomsky v. United States, 9 Cir., 180 F.2d 781, 782, 783.

going to say he thought to be membership. It is now argued that use of the Party's postoffice box in Knoxville in 1937 and the payment of dues to the Party in Washington in 1942-4 prove that he knew he was a member in each of those periods. If there should be another trial, we think that the prosecution should be compelled to declare in a bill of particulars those "overt acts" which it will prove as required in perjury and from which it will argue that the accused believed that he had been a member of the Communist Party. This will not prevent the prosecution from introducing other and corroborating evidence.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 911

CHARLES P. LA PLACA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1965. The petition for a writ of certiorari was filed on January 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for perjury.

2. Whether the district court properly refused to charge that petitioner's knowledge that his testimony was untrue (as distinguished from the objective falsity of his testimony) must be proved by two witnesses or one witness whose testimony is corroborated.

3. Whether the transcript of proceedings in another case, authenticated by the stenographer, was properly admitted in the instant case to show when certain events transpired.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of perjury and sentenced to imprisonment for four years. (R. 150.) The conviction was affirmed on appeal. (Pet. 7a.)

Petitioner, a bail bondsman, was a witness for the defense in the federal prosecution of Alfred Fagundes who was charged with having committed a bank robbery on September 5, 1963, at about 1:15 p.m. (R. 11-12, 21, 39, 44.) On the day of the bank robbery, cases in which petitioner had secured bail were pending against Fagundes in a State court in Cambridge (Pet. App. 2a.) Fagundes claimed presence in the Cambridge court at about the time the robbery was committed (R. 37-38). Petitioner's testimony placed Fagundes in the courthouse at 1:30 p.m. on Septem-

ber 5th in substantiation of Fagundes' alibi (R. 39-43).

At the federal trial, petitioner prefaced his account of the relevant events of September 5th with the statement that he remembered them "Very well" (R. 39). He testified that at 11 o'clock on the morning of September 5th he received word that Fagundes had been defaulted in the Cambridge court. He and Fagundes' attorney drove to Roxbury to look for Fagundes and then proceeded back to Cambridge. When court adjourned at one o'clock, petitioner testified, he mentioned to a police officer, Lieutenant Collins, that Fagundes was an escapee. Petitioner further testified that he then had lunch, returned to the courthouse, and at about 1:30, Fagundes walked in with his attorney. Petitioner entered the courtroom to await the judge. After the first case of the afternoon session was called, the attorney and Fagundes entered the courtroom (R. 39-42). On cross-examination, petitioner said that he placed the time of Fagundes' arrival between recess and the reconvening of the court (between 1 and 2 o'clock), and that Fagundes had come in about a half hour "before court started" (R. 42-43).

Petitioner was indicted for perjury for his testimony in the federal bank robbery prosecution. At petitioner's trial, the government introduced the testimony of the official stenographer for the Cambridge court, who read his transcript of the court's proceedings on the afternoon of September 5th. It showed that the afternoon session was called at 2:00 p.m. (R.

46). After a brief discussion of another case, Fagundes was defaulted (R. 48). At 2:20 p.m., the court commented on the time. Shortly thereafter, Fagundes' attorney reported that Fagundes had sent a message that he would appear in twenty minutes. A recess was taken and thereafter the default was removed (R. 49, 54).

The judge instructed the jury to consider the transcript only insofar as it may tend to show that, the first time the Fagundes case was called during the afternoon session, no one appeared (R. 62-63).

The testimony of the county attorney, who prosecuted the Cambridge court case, established that Fagundes was not present when the case was called shortly after the start of the afternoon session on September 5th (R. 64-65). When the judge presiding in the Cambridge court announced the time as 2:20, the attorney recalled that he verified it by the clock on the wall and his own watch (R. 65-67). The short recess which was taken after Fagundes' attorney addressed the court (in connection with the message from his client) occurred at 2:30 p.m. The county attorney returned to the courtroom at approximately ten minutes of three and saw Fagundes there for the first time (R. 66).

Lieutenant Collins testified that he was in the corridor outside the Cambridge court after 2 o'clock on September 5th. At about 2:30 p.m., petitioner came out of the courtroom and, in a conversation with Collins, petitioner said he had had "another one default just now." Collins asked who had defaulted and pe-

titioner replied that it was Fagundes.[1] Petitioner asked Collins to watch for a man named John Happnie. Collins wrote down the names of both Fagundes and Happnie (R. 75-78). At about 2:45 p.m., Collins saw Fagundes come up the steps and go into the courtroom (R. 79).

In his instructions to the jury, the judge charged, *inter alia*, that the falsity of petitioner's testimony had to be proved by at least one witness and corroborated by other testimony or documentary evidence (R. 133-134). The judge refused defendant's request to charge that the government "is required to prove beyond a reasonable doubt that the defendant knew his testimony was untrue when given and such knowledge must be proved by the sworn testimony of two witnesses, or of one witness whose testimony is corroborated or supported by the other evidence in the case" (R. 140-141).

ARGUMENT

The decision below is correct and the petition presents no question warranting review by this Court.

1. Petitioner's attack on the sufficiency of the evidence (Pet. 10-15) is without merit. He argues, in essence, that he judged the time of Fagundes' appearance by the court's recess which he assumed to be the normal one from 1:00 p.m. to 2:00 p.m. (dividing the morning and afternoon sessions), but which he might reasonably have confused with the special recess

[1] Petitioner's testimony had put the time of his conversation with Collins at 1:00 p.m.

taken from 2:30 p.m. to 2:50 p.m. (during which Fagundes appeared) (Pet. 10-11, 15). However, petitioner's testimony at the Fagundes bank robbery prosecution provides no basis for the contention that he made such an innocent mistake. He was very careful to connect his activities with the lunch-hour recess. He testified that he had attempted to find Fagundes at Roxbury; he then drove back to Cambridge; he had a conversation with Collins lasting five to seven minutes (R. 39); thereafter, he had lunch in five to ten minutes (R. 39); and he returned to the courthouse where, prior to entering the courtroom, he claimed to have seen Fagundes. Petitioner could not have believed he accomplished all that during the special recess in the twenty-minute period between 2:30 p.m. and 2:50 p.m. Petitioner testified that he had seen Fagundes approximately one-half hour before the court resumed (R. 43). It would also have been impossible for that meeting to have occurred during the short special recess. The jury was explicitly instructed that petitioner could not be convicted for an "innocent error", no matter how great (R. 134), and that petitioner had no duty, as a witness, to check the facts before he was called to testify (R. 133). The jury nevertheless found petitioner guilty on evidence which amply supports the conclusion that petitioner deliberately gave false testimony.

Petitioner also asserts that Lieutenant Collins must have been mistaken as to the time of their conversation as there was no reason to ask Collins to look for Fagundes after 2:30, when word had been received that Fagundes would appear in court (Pet. 8,

fn. 2, 14). But Collins did not testify that petitioner asked him to look for Fagundes. Petitioner said that Fagundes had just defaulted and, thereafter, asked Collins to look out for Happnie (R. 77-78). The fact that petitioner specifically asked Collins' assistance with respect to Happnie suggests that petitioner did then expect Fagundes to appear.[2]

2. Similarly unsound is petitioner's view that the "two witness rule" ought to be applied not only to prove the objective falsity of testimony, but "to the myriad other facts from which, in any given case, the inference of subjective falsity may be drawn" (Pet. 17). Since intent is necessarily found by inference from the circumstances in a case, it would follow from petitioner's reading of the law that all evidence used to corroborate the falsity of a statement would itself have to be corroborated. It would create an impossible burden making the requisite intent "never provable". Cf. *Cramer* v. *United States*, 325 U.S. 1, 31. The "two witness" rule merely recognizes that "equally honest witnesses may well have differing recollections of the same *event*"; and it therefore prevents harassment of an innocent witness by requiring something more than the "oath" of one other witness to sustain a perjury conviction. See *Weiler* v. *United States*, 323 U.S. 606, 609 (emphasis added). That purpose is fully served by the tra-

[2] Petitioner's bemoaning of Fagundes' default may have led *Collins* to believe that he ought to watch for Fagundes. Nevertheless, petitioner's request was made solely as to Happnie.

ditional requirement of a stringent quantum of proof to demonstrate objective falsity. To extend the doctrine to the showing of a witness' mental state would destroy the benefits to the judicial process of the criminal sanction for perjury. See *United States* v. *Magin*, 280 F. 2d 74 (C.A. 7), certiorari denied, 364 U.S. 914; *Young* v. *United States*, 212 F. 2d 236 (C.A.D.C.), certiorari denied, 347 U.S. 1015.[3]

3. The trial judge did not err by allowing in evidence the transcript of the Cambridge court. He limited its use to its possible relevance in establishing that the Fagundes case was first called in the afternoon session. Indeed, the judge's restrictive ruling was overly circumspect for the transcript would have been admissible to prove the times noted therein. As pointed out by the court of appeals (Pet. App. 6a), statements serving to mark a time or place are admissible so far as they are relevant to that purpose. See Wigmore, *Evidence* (3rd ed.), Sections 418, 1791.

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[3] Even where the Constitution provides that overt acts of treason be proved by two witnesses, "It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses." *Cramer* v. *United States*, *supra*, at 31. See, also, *Haupt* v. *United States*, 330 U.S. 631.

Petitioner relies on *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907. In that case, the perjury charged was a false statement as to membership in the Communist party. It was held that the acts from which membership could be inferred must be specified, and that the jury must be instructed that such acts be proved in accordance with the perjury rule.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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